SUPREME COURT, U. S.

71 - 5251

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

DAVID ALLEN LUSBY,

Petitioner,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement of the Case	3
How the Federal Questions Were Raised	6
Reasons for Granting Certiorari	6
1. The Importance of the Question	6
2. A conviction for the conduct involved here is inconsistent with this Court's decisions on the allowable parameters of First Amendment activity	8
Conclusion	13
Appendix	
Judgment of the Supreme Court of Appeals of Virginia	15
Judgment of the Trial Court	16

Table of Authorities

Cases:

Adderly v. Florida, 385 U.S. 39 (1966) 7, 10

Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968) 7, 8, 10, 11

PAGE

Bachellar v. Maryland, 397 U.S. 564 (1970) 9
Bouie v. Columbia, 378 U.S. 347 (1964) 7
Brown v. Louisiana, 383 U.S. 131 (1965) 7, 8-9, 12

Campbell v. State, 271 N.E.2d 463 (Ind. 1971) 8
Cohen v. California, 403 U.S. 15 (1971) 9
Commonwealth v. Egleson, 244 N.E.1d 589, *app. dismissed, cert. denied,* 395 U.S. 336 (1969) 8
Cox v. Louisiana, 379 U.S. 536 (1965) 7

Edwards v. South Carolina, 372 U.S. 229 (1963) 7

Hall v. Commonwealth, 188 Va. 72, 49 S.E.2d 369 (1948), *app. dismissed,* 335 U.S. 875 (1948) 6
Henderson v. Trailway Bus Company, 194 F. Supp. 423 (E.D. Va. 1961), *aff'd sub nom.,* Robinson v. Hunter, 374 U.S. 488 (1963) 6
Hurley v. Hinckley, 304 F. Supp. 704 (D. Mass. 1969), *aff'd sub nom.,* Doyle v. O'Brien, 396 U.S. 277 (1970) 12

Jones v. Board of Regents of the University of Arizona, 436 F.2d 618 (9th Cir. 1970) 11

Lovell v. Griffin, 303 U.S. 444 (1938) 8

Marsh v. Alabama, 326 U.S. 401 (1946) 8, 10
Martin v. City of Struthers, 319 U.S. 141 (1943) 8

Organization for a Better Austin v. O'Keefe, 402 U.S. 415, 29 L. Ed.2d at 5 (1971) 8

Price v. Commonwealth, 209 Va. 383, 164 S.E.2d 676 (1968) 6

Randolph v. Commonwealth, 202 Va. 661, 119 S.E.2d 817 (1961) 6

PAGE

Schneider v. State, 308 U.S. 147 (1939) 11
State v. Hanapole, 178 S.E.2d 247 (S.C. 1970) 8

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 9, 11
Tucker v. Texas, 326 U.S. 517 (1946) 10

United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 909 (1970) 9

Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) 11

Constitutional Provision:

United States Constitution
First Amendment 2, 6, 7, 8, 9, 10, 11, 12

Federal Statutes:

28 U.S.C. §1257(3) 2
50 U.S.C. App. §462(a) 9

State Statutes:

Burns Ind. Stat. Ann.:
§10-4533 6
§10-4534 6

Mass. Gen. Laws Ann. Tit. 266, §123 6

Miss. Code 1942 Ann. §2409.7 6

N.Y. Penal Law §140.05 6

Vt. Stat. Ann.
§13:3702 6
§13:3705 6

PAGE

Virginia Code §18.1-173 ..... 2, 3, 6

Wis. Stat. Ann. §943.14 6

Federal Regulations:

32 CFR §1606.32 10

§1606.57(d) 10

IN THE

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OCTOBER TERM, 1971

No. .....

DAVID ALLEN LUSBY,

Petitioner,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia (now the Supreme Court of Virginia) entered in this proceeding on June 15, 1971.

Opinions Below

No opinions were rendered below. The order of the Supreme Court of Appeals, denying a writ of error and affirming the conviction, is set forth in the Appendix, *infra*, at p. 15. The judgment of conviction entered in the Circuit Court of Fairfax County, Virginia is set forth in the Appendix, *infra*, at pp. 16-17.

Jurisdiction

The judgment of the Supreme Court of Virginia, denying a writ of error and affirming petitioner's conviction, was entered on June 15, 1971. On September 10, 1971, Mr. Justice Stewart granted an extension of time in which to file this petition to and including October 13, 1971. The jurisdiction of this Court rests upon 28 U.S.C. Section 1257(3).

Question Presented

Whether a criminal trespass statute can be applied, consistent with the First Amendment, to peaceful, non-disruptive leafleting in the public reception area of a selective service board office?

Statute Involved

Virginia Code Section 18.1-173 provides in pertinent part as follows:

> Section 18.1-173. *Trespass after having been forbidden to do so.*—If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted on such lands, buildings, premises or part, portion or area thereof at a place or places where it or they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be

punished by a fine of not more than one thousand dollars or by confinement in jail not exceeding twelve months, or by both such fine and imprisonment.

Statement of the Case

On October 7, 1970 the petitioner was convicted following a non-jury trial for violation of the Virginia Code, Section 18.1-173. He was sentenced to pay a fine of $100. A timely appeal was taken to the Virginia Supreme Court of Appeals, and the conviction was affirmed.

The facts upon which the conviction was based were as follows.

On December 22, 1969 at approximately 10:00 A.M. the petitioner and his companion, Bonnie Atwood, entered the offices of Selective Service Local Board No. 39 in Fairfax City, Virginia (T. 15, 55).[1] Their purpose was to distribute to draft registrants leaflets opposing the draft and the war in Vietnam (T. 55). The location in which they handed out their leaflets was the public reception area of the draft board office. This waiting area or lobby, rectangular in shape, was furnished with chairs, tables and a couch for general public use (T. 8, 28). The area also contained pamphlet racks with armed services recruiting literature (T. 28, 42, 67). One draft board employee testified that while members of the public did not come into the reception area frequently, no member of the public would ever be excluded (T. 20, 28). The area is frequented by registrants.

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[1] "T" refers to the transcript of the trial in the Circuit Court of Fairfax County. Ms. Atwood was tried jointly with petitioner and also convicted. She was sentenced to pay a $100 fine. Following a dispute over her right to appointed counsel, her appeal was dropped.

their families or friends and others (T. 54-55). The public reception area was divided from the rest of the board's office space by a service counter running almost the entire width of the area (T. 20). The Board employees perform their tasks in the large area behind the service counter.[2]

Throughout their three hour stay, the petitioner and his companion confined their activities to the reception area; they never entered the area where draft board employees were working (T. 55-57, 64). As a registrant entered the reception area, on his way to the service counter, the petitioner would hand him a leaflet or place one in front of the registrant on the counter (T. 18, 23, 24). Some registrants merely glanced at the leaflet without more (T. 27). Occasionally the petitioner or Ms. Atwood would converse briefly with a registrant (T. 62-63). During the three-hour stay, a few fellow demonstrators would enter the reception area for brief periods of time and then leave. There was no evidence that any registrant was detained or pestered in any way. Mrs. Costello, the acting draft board supervisor, characterized the petitioner's conduct as neither "rude, boisterous [n]or unmannerly" (T. 29). No violence, assaults or abusive language occurred.

After the petitioner distributed his leaflets for a short period of time, Mrs. Costello informed him that he could not do so. Her testimony is contradictory as to whether she also told him to leave (T. 17, 28).[3] The petitioner

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[2] The board offices were located in a two story building, owned by a private company, which also housed the post office and two private organizations (T. 2-4).

[3] In ordering the petitioner to stop handing out leaflets, Mrs. Costello purportedly relied on an old General Services Administration regulation; no such regulation was posted (T. 16).

politely refused and continued his activities (T. 23). The draft board employees complained that the petitioner's activities interfered with their work in the following manner. As a registrant approached the service counter, the employee would walk over to assist him; if he then paused to read or superficially glance at the leaflet, she would be forced to remain standing for a moment or so (T. 24, 33, 36). Neither of the employees ever tried to prompt a registrant by asking whether they could help him (T. 27). They also complained that when someone approached the counter, they could not initially determine whether he was a registrant or a demonstrator (T. 29).[4]

Shortly after 11:00 A.M. police Sergeant Buckholtz arrived pursuant to Mrs. Costello's request (T. 44).[5] He informed her that the petitioner and the others could be charged with trespassing if she requested them to leave (T. 45). She consulted with her Selective Service superiors for roughly an hour (T. 18-19, 26-27), and shortly after noon ordered the individuals to leave (T. 46). They refused and she left to obtain a warrant. The petitioner and Ms. Atwood were arrested for trespass at 1:30 P.M.

Following the trial, the judge concluded that the reception area was not "a public place" exempt from the operation of the trespass statute and that there was "interference" with draft board activities (T. 2).

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[4] During the morning, the petitioner would occasionally be joined by other protesters who were picketing outside. There was disagreement among draft board employees as to the maximum number of such individuals who were in the waiting room at any one time (T. 22, 34). Ms. Atwood testified that the number was about four or five (T. 62).

[5] He claimed that he had to "push" his way through the demonstrators (T. 47-48); the petitioner disputed this (T. 57).

How the Federal Questions Were Raised

The question tendered herein was presented to the State courts by way of motion to dismiss following the prosecution's evidence and again at the end of the trial (T. 71-72). The issue was thereafter raised by Petition for a Writ of Error and Supersedeas to the Supreme Court of Appeals of Virginia.

Reasons for Granting Certiorari

1. *The Importance of the Question.*

The broad question posed by this case is the extent to which a general criminal trespass statute can be applied to interdict and punish peaceful, non-disruptive First Amendment activity.* In the past decade, this Court has con-

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*The statute here contains three essential elements: going or remaining (1) without authority of law, (2) after being forbidden to do so (3) upon the lands or premises of another. It is representative of many such state statutes. See, N.Y. Penal Law, Section 140.05; Vt. Stat. Ann. Section 13:3705; Wis. Stat. Ann. Section 943.14; Mississippi Code 1942 Ann. Section 2409.7. Many states also have a separate statute dealing with trespass to public lands or buildings or public schools. See Mass. Gen. Laws Ann. Tit. 266, Section 123; Vt. Stat. Ann. Section 13:3702; Burns Ind. Stat. Ann. Sections 10-4534, 10-4535. Virginia has no such general statute dealing with public buildings, but does have a trespass-type provision as to colleges and university premises. Virginia Code, Section 18.1-173.2. The statute applied here had been uniformly held applicable only to *private* property, not to government property or places affected with a public interest. See, *Randolph* v. *Commonwealth*, 202 Va. 661, 119 S.E.2d 817 (1961); *Hall* v. *Commonwealth*, 188 Va. 72, 49 S.E.2d 369 (1948), *app. dismissed*, 335 U.S. 875 (1948); *Price* v. *Commonwealth*, 209 Va. 383, 164 S.E.2d 676 (1968); see generally, *Henderson* v. *Trailway*

sidered a variety of general misdemeanor statutes, such as breach-of-the-peace and disorderly conduct, used to regulate or prevent First Amendment conduct. See, e.g., *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963). However, it has ruled upon the use of general criminal trespass statutes on only one occasion, in *Adderly* v. *Florida*, 385 U.S. 39 (1966).[7] Of course, the discussion in *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308 (1968), has great relevance, but it was decided in the context of a private suit for injunctive relief. Equally relevant is the decision in *Brown* v. *Louisiana*, 383 U.S. 131 (1965) which, though arising under a breach of the peace statute, involved activity almost identical to the conduct punished here. Somewhere between the boisterous, mass demonstration on jail property disallowed by a narrow majority of this Court in *Adderly* and the silent protest at a public library upheld by a similarly divided Court in *Brown*, the line of First Amendment protection must be drawn. This case raises precisely that issue. And it is one of substantial importance as more states enact statutes forbidding trespass on public property or, as here, enforce their general trespass laws in order to prohibit First

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Bus Company, 194 F. Supp. 423 (E.D. Va. 1961); *aff'd, sub nom.*: *Robinson* v. *Hunter*, 374 U.S. 488 (1963) (construing the statute not to apply to public places, such as a bus station, in order to save its constitutionality).

In order to avoid the clear thrust of these decisions interpreting the statute, the trial judge of necessity had to find that the draft board reception area was not "a public place".

[7] The issue arose in *Bouie* v. *Columbia*, 378 U.S. 347 (1964), but the case was decided on the ground that because of intervening state court decisions which radically altered the meaning of the statute, the petitioners had been denied fair notice that their conduct was deemed criminal.

Amendment activity in such locations. See footnote 6, *supra*.[8]

2. *A conviction for the conduct involved here is inconsistent with this Court's decisions on the allowable parameters of First Amendment activity.*

Relevant principles drawn from this Court's decisions make it clear that peaceful, non-disruptive leafleting in the public reception area of a draft board office cannot be made criminal.

First, it has been long settled that leafleting is entitled to a high degree of First Amendment protection. See, *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Martin* v. *City of Struthers*, 319 U.S. 141 (1943); *Marsh* v. *Alabama*, 326 U.S. 401 (1946); *Amalgamated Food Employees* v. *Logan Valley Plaza*, *supra*. Just recently, Chief Justice Burger reaffirmed this principle:

> This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment. *Organization for a Better Austin* v. *O'Keefe*, 402 U.S. 415, 29 L. Ed. 2d at 5 (1971).

It is similarly settled that First Amendment activity of this kind cannot be prohibited merely because it takes place on public property or in public buildings. See, *Brown*

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[8] There is a division among state courts on this question. While the court below and the Massachusetts Judicial Court (*Commonwealth* v. *Egleson*, 244 N.E.1d 589, *app. dismissed, cert. denied*, 395 U.S. 336 (1969)) have applied their trespass statutes to activity of the kind involved here, the Indiana and South Carolina Supreme Courts have reached different conclusions. See *Campbell* v. *State*, 271 N.E.2d 463 (Ind. 1971); *State* v. *Hanapole*, 178 S.E. 2d 247 (S.C. 1970).

v. *Louisiana, supra; Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Cohen* v. *California*, 403 U.S. 15 (1971). Thus, for example, in *Tinker*, the silent communication of ideas within the geographical confines of a high school building was protected even though those ideas provoked controversy. In *Cohen*, printed words, offensive to some, were nevertheless allowed to be communicated in the corridors of a courthouse. There, those passersby offended by the message could simply "avert their eyes"; here those registrants disinterested in the message merely glanced at it and went about their business. Only in the physical act of distribution of the printed leaflets did the conduct here differ in the slightest respect from the "silent passive protest" in *Tinker*, the "silent and reproachful presence" in *Brown* or the silent, though potentially offensive sign in *Cohen*. Nor can there be any distinction between schools, courthouses, libraries and selective service offices. Draft board offices, like military recruiting centers, cannot be insulated from otherwise legitimate First Amendment activity directed at them. See, *Bachellar* v. *Maryland*, 397 U.S. 564 (1970) (leafleting and picketing in front of a recruiting station).[9]

Finally, we think that this court's decisions make it clear that First Amendment activity can be regulated only when

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[9] Specific interference "by force or violence or otherwise" with draft board functions is made punishable under the selective service laws. 50 U.S.C. App. Section 462(a). Prosecutions for such conduct have been brought successfully by the United States. See *United States* v. *Eberhardt*, 417 F.2d 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 909 (1970) (destruction of draft files). Presumably, and obviously, the petitioner was not prosecuted under federal law because his activities did not "interfere" with selective service functions within the meaning of the federal statute, despite the trial court's finding that there was "interference."

it causes *material and substantial* interference with the primary purpose of and appropriate use to which the public place is put.

First, despite the finding below, this draft board reception area was a public place. Ever since *Marsh* v. *Alabama, supra*, this Court has held that the mere fact of ultimate private ownership of the premises is not determinative. See *Amalgamated Food Employees* v. *Logan Valley Plaza, supra*. Indeed, even ownership by the federal government cannot, without more, prevent an area from being characterized as a public place. *Tucker* v. *Texas*, 326 U.S. 517 (1946) (the companion case to *Marsh*). The test under these cases is whether the area "is freely accessible and open to the public". Here, the record shows that it was. Registrants and their parents, other relations and friends entered and used the area constantly. Draft information, as well as recruiting literature, was readily available.[10] That the general public did not frequent the reception area in droves does not matter. The vital element is that, as the draft board employees testified, the area was open to the public, whose members would not be excluded. Compare *Adderly* v. *Florida, supra* (noisy demonstration "on that part of the jail grounds reserved for jail uses". *Id.* at 47).

Once an area is found to be open to the public, First Amendment activities can be regulated only to the extent that they cause substantial interference with the principal use to which the area is put. As to the issue of appro-

[10] Indeed, Selective Service Regulations not only allow a registrant to authorize anyone to go and examine his file, 32 CFR Section 1606.32, but allow any member of the public to obtain certain kinds of information at local draft boards. See 32 CFR Section 1606.57(d).

priate use, the fact that the area has not traditionally been used for First Amendment purposes or that it is primarily dedicated to other uses does not make the site inappropriate. *Tinker* v. *Des Moines Independent Community School District, supra; Wolin* v. *Port of New York Authority*, 392 F.2d 83, 89-90 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968). In *Tinker*, the Court noted that "the dedication [of a public place] to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property." *Id.* at 512, n. 6. So long as the place is either the object of protest, or contains the relevant audience, its use for First Amendment purposes is "generally consonant with the use to which the property is actually put". *Amalgamated Food Employees* v. *Logan Valley Plaza, supra* at 319; *Wolin* v. *Port of New York Authority, supra* at 90. Here, these criteria are met. And, of course, leafleting is a perfectly acceptable method of exercising such First Amendment rights. See *Logan Valley Plaza, supra; Jones* v. *Board of Regents of the University of Arizona*, 436 F.2d 618 (9th Cir. 1970).

Assuming that the place is appropriate, then the state may intervene only if the First Amendment activity transcends a certain level of interference with the normal use of the facility. In *Logan Valley Plaza*, the level was characterized as one of significant interference. 391 U.S. at 323. In *Tinker*, the Court indicated it would require material disruption of or substantial disorder to discipline or classwork. 393 U.S. at 513. Slight inconvenience, annoyance or interference cannot provide a basis for abridging peaceful protest. See *Schneider* v. *State*, 308 U.S. 147, 162 (1939). And it is highly doubtful whether the

interference with the normal functions of the draft board depicted in this record arose even to the level of slight inconvenience. Discounting the time Mrs. Costello had to devote to determining whether to arrest petitioner and effecting that arrest, the only "interference" involved the momentary hesitation which the employees had to suffer before they could service a registrant. That level of nuisance is grossly inadequate to justify this conviction. See *Brown* v. *Louisiana*, *supra*.[11]

In sum, this trespass conviction for peaceful leafleting in the public reception area of a draft board office is inconsistent with the decisions of this Court. The trespassory sanction cannot be used to prevent such activity.

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[11] The distinction between slight annoyance and substantial interference was highlighted in *Hurley* v. *Hinckley*, 304 F. Supp. 704 (D. Mass. 1969) (three-judge court), *aff'd sub nom.*, *Doyle* v. *O'Brien*, 396 U.S. 277 (1970). That case involved two sets of plaintiffs seeking to enjoin prosecutions of welfare recipients for trespass. In one case, a large group of people had in effect taken over a welfare office, using loud, obscene language and suspending the operation of the office. In the other case, one woman simply distributed leaflets discussing welfare rights in the waiting room. Though the court ruled the trespass statute facially constitutional, —the only issue before it—the court felt there was "a strong argument" for First Amendment protection in the latter situation. 304 F. Supp. at 712.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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October 13, 1971

APPENDIX

Judgment of the Supreme Court of Appeals of Virginia

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 15th day of June, 1971.

The petition of David Allen Lusby for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Fairfax County on the 7th day of October, 1970, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said Court.

And it is ordered that the Commonwealth recover of the plaintiff in error the costs to be taxed by the clerk of this court and the costs to be assessed in this case by the clerk of the court below.

A copy, Teste:

Howard G. Turner, Clerk

By: R. P. Tomlinson, Deputy Clerk

Costs due the Commonwealth

By Plaintiff in Error in
Supreme Court of Appeals:
Filing Fee $1.50

Teste:

Howard G. Turner, Clerk

By: R. P. Tomlinson, Deputy Clerk

Judgment of the Trial Court

IN THE

CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

CR. 16025

APPEAL—TRESPASSING

COMMONWEALTH OF VIRGINIA,

v.

DAVID ALLEN LUSBY.

This 7th day of October, 1970, came the Commonwealth by her Attorney; and the Defendant, DAVID ALLEN LUSBY, appearing agreeably in accordance with his recognizance of bail, and also appeared Richard Crouch, Counsel for the Defendant.

Thereupon, the Court Reporter was sworn.

Thereupon, the Defendant was arraigned upon the warrant returned herein, to which warrant, the Defendant, in person, entered a plea of not guilty. And after being advised by the Court of his right to trial by jury, the Defendant, in person and in writing signed by him, waived his right to trial by jury, and with the concurrence of the Attorney for the Commonwealth and of the Court, here entered of record. The Court then heard all the evidence on behalf of the Commonwealth and upon conclusion of the evidence presented on behalf of the Commonwealth, counsel for the Defendant made a motion to strike the evidence

presented, which motion the Court after hearing arguments thereon, took under advisement.

The Court proceeded to hear all the evidence on behalf of the Defendant. Whereupon counsel for the Defendant renewed his motion to strike the evidence presented on behalf of the Commonwealth, which motion the Court after hearing argument, thereon denied.

In consideration of the evidence heard the Court doth find the Defendant, DAVID ALLEN LUSBY, guilty of trespassing as charged in the warrant.

IT IS THEREFORE ADJUDGED AND ORDERED that DAVID ALLEN LUSBY do pay a fine of $100.00 and the costs of this case.

And the Defendant having indicated his desire to apply to the Supreme Court of Appeals for a writ of error, it is ADJUDGED and ORDERED that the execution of the sentence be, and the same hereby is postponed for a period of sixty days from this date and thereafter until the Supreme Court has acted on said petition, provided all steps necessary to perfect said appeal to be taken in this Court are taken within the aforesaid sixty day period.

And the defendant is continued on bond.

Albert V. Bryan, Jr.
Judge

A copy, Teste:

W. Franklin Goodling, Clerk

By: Linda C. Miller, Deputy Clerk

Supreme Court, U. S.
FILED
MAR 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

71-5251

DAVID ALLEN LUSBY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Statement of Case	2
Question Presented for Review	3
Argument	3
Conclusion	7

TABLE OF CITATIONS

C A S E S

PAGE

Adderly vs. Florida, 385 U.S. 39, 17 L Ed 2d 149, 87 S Ct 242 (1966).....4

Amalgamated Food Employees v. Logan Valley Plaza, 391 US 308, 20 L Ed 2d 603, 88 S Ct 1601 (1968).....4

Cameron v. Johnson, 390 US 611, 616, 20 L Ed 2d 182, 187, 88 S Ct 1335.....4

Cox v Louisiana, 379 US 559, 13 L Ed 2d 487, 85 S Ct 476 (1965), 391 US at p 320, 20 L Ed 2d at p. 613.....4

Johnson v. Commonwealth of Virginia, Record No. 7749 _____Va _____(January 17, 1972).....3

OTHER AUTHORITIES

Virginia Code Section 18.1-173..... 2

28 U.S.C. Section 1257(3)..... 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

DAVID ALLEN LUSBY,

Petitioner,

-v-

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

On October 7, 1970, the Petitioner was convicted in the Circuit Court of Fairfax County, Virginia, of trespassing, in violation of Virginia Code Section 18.1-173, and was fined One Hundred Dollars ($100.00). Thereafter, the Supreme Court of Appeals denied Petitioner's Writ of Error and upheld his conviction.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. Section 1257(3).

STATUTE INVOLVED

Virginia Code Section 18.1-173 provides in pertinent part as follows:

> Section 18.1-173. Trespass after having been forbidden to do so. If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted on such lands, buildings, premises or part, portion or area thereof at a place or places where it or they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by confinement in jail not exceeding twelve months, or by both such fine and imprisonment.

STATEMENT OF THE CASE

On December 22, 1969, the Petitioner was arrested for trespassing in the offices of Selective Service Local Board Number 39 in Fairfax City, Virginia (T. 15, 55). The time that the Petitioner selected to linger in Fairfax City's Selective Service Board Office and pass out anti-war literature was one of the busiest of the year for the office (T. 61, 118). The Petitioner was not there to ask for any draft related information from anyone (T. 20). To further complicate matters the reception area measured approxi-

mately ten feet by twenty feet (T. 20). Petitioner remained in the reception area for approximately three hours prior to the final request to leave, and thereafter stated that he knew the Complainant's position but for her to go right ahead and get the trespassing warrant (T. 23). The interference by Petitioner was substantial in that it caused considerable lost time for the employees working in Local Board Number 39 (T 23, 24, 33, 34, 40, 41). On one occasion, the entranceway to Board Number 39's office was congested by the presence of the demonstrators (T 47, 48) and the congestion restricted the ingress and egress of bona fide personnel.

QUESTION PRESENTED FOR REVIEW

Whether the First Amendment of the United States Constitution permits conduct proscribed by Virginia Code Section 18.1-173.

ARGUMENT

Virginia Code Section 18.1-173 makes it a misdemeanor for any person to remain upon the premises of another without authority after having been prohibited from doing so by the person lawfully in charge thereof.

It is clear that the Virginia Code Section 18.1-173 is applicable to public property as well as private property. Johnson v. Commonwealth of Virginia, Record No. 7749, ___ Va. ___ (January 17, 1972).

The question is then presented whether Petitioner's conduct is protected by the First Amendment of the Federal Constitution. If not, his conviction in the case at bar was justified and should be affirmed. Respondent submits that the principles controlling this issue were set forth in the case of Amalgamated Food Employees v. Logan Valley Plaza, 391 US 308, 20 L Ed 2d 603, 88 S Ct 1601 (1968) wherein the Court stated as follows:

> "Where municipal or state property is open to the public generally, the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the State. Thus we have upheld a statute prohibiting picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses." Cameron v. Johnson, 390 US 611, 616, 20 L Ed 2d 182, 187, 88 S Ct 1335. Likewise it has been indicated that persons could be constitutionally prohibited from picketing "in or near" a court "with the intent of interfering with, obstructing, or impeding the administration of justice." Cox v Louisiana, 379 US 559, 13 L Ed 2d 487, 85 S Ct 476 (1965), 391 US at p 320, 20 L Ed 2d at p. 613.

Additionally, in Adderly vs. Florida, 385 U.S. 39, 17 L Ed 2d 149, 87 S Ct 242 (1966), the Petitioner and others entered a jail grounds through a driveway used only for jail purposes without warning to or permission from the sheriff. The demonstrators refused to move from the property upon request and were arrested for and convicted of trespassing. The Court, affirming their convictions, stated as follows:

> "The State, no less than a private owner of property, has power to preserve the property under

> its control for the use to which it is lawfully dedicated. For this reason there is nomerit to petitioner's argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this "area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate. . . . Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthright rejected in two of the cases petitioners rely on [citing cases]. We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." 385 US at p.47, 17 L Ed 2d at p. 156.

In the instant case, the time that the defendant selected to linger in Fairfax City's Selective Service Board Office and pass out anti-war literature was one of the busiest of the year for the office. The defendant was not there to ask for any draft related information from anyone. To further complicate matters, the reception area measured approximately ten feet by twenty feet. Defendant remained in the reception area for approximately three hours prior to the final request to leave, and thereafter stated that he knew the complainant's position but for her to go right ahead and get the trespassing warrant. The interference by Defendant was substantial in that it caused considerable lost time for the employees working in Local Board Number 39. On one occasion, the entranceway to Board Number 39's office was congested by the presence of the demonstrators and the congestion restricted the ingress and egress of bona fide personnel.

In the case at bar, the trial court found that the

Petitioner's conduct interfered with the primary use of the offices of Selective Service Local Board Number 39 in Fairfax City, Virginia. It is clear that the acting draft board's supervisor had both the right and the obligation to prevent interference with the operation of the business of the board by ejecting the Petitioner. His refusal to leave plainly constituted a violation of Virginia Code Section 18.1-173. Therefore, your Respondent respectfully submits that Petitioner's conviction should be affirmed.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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